IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

No. 24-ICA-156

STEPHEN H. BLAYDES, M.D,

Plaintiff-Petitioner

v.

PRINCETON COMMUNITY HOSPITAL ASSOCIATION, INC.
Defendant-Respondent

Circuit Court of Mercer County
Civil Action No. 22-C-137

BRIEF OF RESPONDENT, PRINCETON COMMUNITY HOSPITAL ASSOCIATION, INC.

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STATEMENT OF THE CASE

Respondent Princeton Community Hospital Association, Inc. ("PCH") agrees with the procedural history set forth in the brief of Petitioner Stephen H. Blaydes, M.D. ("Dr. Blaydes"). PCH will set forth below additional aspects of the factual record needed to complete the record.

Dr. Blaydes, as his brief notes, was a long-time ophthalmologist who performed eye surgeries at the now-closed Bluefield Regional Medical Center ("BRMC"). Br. at 6. As also noted by Dr. Blaydes, the "negligent misrepresentation and fraudulent misrepresentation claims" of the complaint "are based on representations by PCH to Dr. Blaydes regarding the reopening of an ambulatory surgical center owned by PCH (the RSS), at which Dr. Blaydes anticipated performing eye surgery." Br. at 5. Dr. Blaydes had been a part owner of the RSS before it was closed in 2018, due to financial problems. App. 51, 55 at 24:9-25:3; 39:18-24. PCH had acquired the RSS facility in connection with its acquisition of BRMC in 2019. App. 17, Compl. ¶ 3.

In 2019, prior to the discussion with PCH on reopening the RSS, Dr. Blaydes began discussions, on enlarging his practice, with a long-time friend and ophthalmologist, Dr. Blake Myers. App. 75, 48, 72 at 121:2-6, 10:3-17, 108:18-109:7. Dr. Blaydes was considering retirement in three to five years and thought that Dr. Myers would be a "short term fit" and would aid in attracting a younger ophthalmologist. App. 75 at 121:2-24. By February of 2020, Dr. Myers had obtained approval from the West Virginia Board of Medicine for his professional corporation. App. 73 at 111:17-20.

The initial discussion with PCH regarding reopening of the RSS occurred a few months thereafter, in April of 2020, between Wayne Giffith and Dr. Blaydes. App. 53 at 30:9-21. At the time, Mr. Giffith[1] a former CEO of PCH, had been retained by the Board of Directors of PCH (the "PCH Board" and/or the "Board") for strategic planning. App. 53 at 30:22-31:1. In the meeting, Mr. Griffith advised Dr. Blaydes of the planned closing of BRMC but said that the hospital would "get the surgery center [RSS] open for you." *Id*. at 31:4-24. Dr. Blaydes said that the news was "great timing" and advised Mr. Griffith of his plans to recruit another ophthalmologist to the area. App. 53 at 31:22-24.

Dr. Blaydes had one more meeting with Mr. Giffith, at which he learned of Mr. Griffith's serious health issues that meant he "would not be able to participate" but "the staff had direction to get the place open." App. 54 at 36:8-21. Mr. Giffith did not name any individuals but "we all knew who would be in charge," which was the "head leadership of the hospital": Jeff Lilley (CEO), Rose Morgan (Vice President) and Frank Sinicrope (CFO). App. 55 at 40:20-41:5. Rose Morgan was assigned to "spearhead" the effort and she provided periodic updates on the status. App. 57-58, 64 at 49:21-50:6, 76:4-11.

In order to reopen the RSS, Dr. Blaydes knew a "lot of prep work" would be needed. App. 54 at 37:21-22. Dr. Blaydes voluntarily provided, shortly after the meeting in April of 2020, information on staffing needed to operate a surgical practice in the RSS. App. 55-56 at 41:18-42:12. In May of 2020, he was contacted via email by Rose Morgan on another staffing issue, who asked: "Assuming we are able to get the RSS surgery center opened, and things are looking in progress and well thus far, would you be interested in fulfilling the role of medical

[1] Mr. Griffith was deceased by the time of the litigation. App. 54 at 36:10-17.

director?" App. 59 at 54:8-20. Dr. Blaydes later (in August of 2020) gave information on the expected numbers of cases to be performed, to be used in putting together financial *pro forma* for the PCH Board. App. 64-65 at 77:15-78:3.

In general, Dr. Blaydes knew the work involved in reopening would be "quite extensive" and knew it would involve licensure, certificate of need ("CON") and other matters, as well as probable "maintenance" on the building because it "hadn't been used in a year and a -- a year and a half or so, two years maybe." App. 54 at 37:16-22. He testified that he went to the facility in June of 2020 with Dr. Myers, where they received "an updated report on where things stood" and could see that minor renovations, including new flooring, had been completed, and that the hospital had purchased items to "get it better" such that "from the patient care standpoint [the facility] was in good shape." *Id.* at 68:13-21. Dr. Blaydes testified that the management team was taking "the necessary steps to reopen" the facility and that "[e]verybody was working hard to get it open." App. 94 at 194:18-195:1, 195:24-196:4.

In fact, "everybody worked hard to make it happen until the rug was pulled out." App. 95 at 198:15-18. The reference to the "rug being pulled out" was the decision of the PCH Board not to proceed with the project. Dr. Blaydes had been contacted about a financial *pro forma* on August 7, 2020, that he knew was being developed for the Board. App. 65 at 79:8-10. Jeff Lilley warned Dr. Blaydes, in an August 24, 2020, email, of his "sense that the board is not happy with this lack of profitability" and that they "would know tomorrow night." App. 67 at 86:10-15. Shortly thereafter, Mr. Lilley met with Dr. Blaydes and advised him that the Board had voted not to reopen the RSS. *Id*. at 87:21-88:17. The Board was concerned about the financial feasibility of operating the RSS. *Id*. at 100:9-12. Mr. Lilley told Dr. Blaydes that there "are things that the board approves or denies that I don't agree with, and this is one of them." App. 67 at 88:3-4.

Dr. Blaydes had previously served on the board of St. Luke's Hospital for about ten years. App. 52 at 28:12-29:8. He knew that a decision such as reopening an ambulatory care facility would need to be approved by the Board. App. 52 at 27:16-20, and 67 at 87:12-15. Wayne Griffith did not tell Dr. Blaydes that the PCH Board had approved the project, and Dr. Blaydes did not ask. App. 53 at 32:19-22. No PCH representative told Dr Blaydes that there had been prior Board approval, and he did not ask any of them if such approval had occurred. App. 65 at 79:15-22.

At his deposition, Dr. Blaydes was asked whether any of the PCH representatives he dealt with had said something that he or she (the representative) did not believe was true. As to Wayne Griffith, Dr. Blaydes' answer was "No, never." App. 93 at 192:24-193:3. Dr. Blaydes was also asked whether Mr. Lilley ever "said something about reopening the [RSS] that he did not believe to be true"; Dr. Blaydes answered "No." App. 94 at 194:3-5. Dr. Blaydes was asked whether Rose Morgan or Frank Sinicrope "said something about the reopening" that she or he did not believe; in each case, Dr. Blaydes answered "no." *Id*. at 194:6-19. Dr. Blaydes testified that he "had no reason to believe" Mr. Lilley or Ms. Morgan were dishonest and that he "did not believe that [Mr. Sinicrope] was dishonest with me at any time." *Id*. at 195:2-16

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

PCH requests oral argument under Rule 19 of the Rules of Appellate Procedure. Oral argument is appropriate under that rule because the relevant law is settled, but the Petitioner seeks an incorrect application of the law and, in part, an implied change to the settled law. For those reasons, a memorandum decision may not be appropriate.

SUMMARY OF ARGUMENT

The opening brief of Dr. Blaydes asserts a number of errors by the circuit court with regard to both his fraudulent misrepresentation and his negligent misrepresentation claims. The errors can be grouped into three categories. Dr. Blaydes first asserts that there is a major distinction between the types of statements that can form the basis of a negligent misrepresentation claim compared to a fraudulent misrepresentation claim. Second, Dr. Blaydes accuses the circuit court in general of invading the province of the jury by weighing the evidence with regard to the statements at issue. Third, Dr. Blaydes specifically argues that PCH's promises regarding reopening of the RSS implied a very specific factual statement about the PCH Board. In all three areas, Dr. Blaydes fails to show any error by the circuit court.

Dr. Blaydes' first contention of error is that West Virginia law on negligent misrepresentation departs in a major way from the law as to fraudulent misrepresentation. Dr. Blaydes alleges that any statement – such as promises or opinions, and not just statements of fact – can be the basis for a negligent misrepresentation claim. That position is not found in the only case Dr. Blaydes cites in support, *Folio v. City of Clarksburg*. 221 W. Va. 397, 655 S.E.2d 143 (2007). Dr. Blaydes' position has also been expressly rejected in numerous other courts and is contrary to black letter law on negligent misrepresentation. Although negligent misrepresentation involves a different degree of culpability from fraudulent misrepresentation, it is settled that, for both causes of action, promises or projections about the future are not a proper basis for a misrepresentation claim.

Dr. Blaydes' second set of complaints is that the circuit court invaded the province of the jury with regard to both his fraudulent misrepresentation and his negligent misrepresentation

claims. The circuit court's *only* holding on the issue was that the statements at issue were promises or predictions about the future. On that point, a review of the statements confirms that there was no genuine issue of fact. As conceded in Dr. Blaydes' brief, both causes of action are "based on representations…regarding the reopening" of the RSS. Br. at 5. The "reopening" was necessarily in the future. Dr. Blaydes makes the bald assertion that the statements "were factual," without an effort to explain the assertion. Dr. Blaydes cites no support for the theory that the statements are anything other than promises as to a future event – the "reopening."

The third complaint by Dr. Blaydes is related to the second, in that he contends that the circuit court should have held that the promises as to reopening implied a very specific factual statement: that the PCH Board had previously approved the project before he was contacted. That contention is made without the benefit of authority and relies on an incorrect assumption: that a promise or representation as to the future means that the promisor has resolved all potential issues and overcome all possible problems or barriers. There is no authority cited by Dr. Blaydes for that proposition and it would alter existing West Virginia law on promissory statements and future predictions. In that regard, the Supreme Court of Appeals has held that such statements imply only that the speaker has a good faith intent and belief regarding the promise. Dr. Blaydes seeks to go beyond that and imply a representation that all potential obstacles have been investigated and removed. In addition to trying to alter the law on promissory statements, Dr. Blaydes' position makes an irrational assumption that the PCH Board would have approved the project before knowing Dr. Blaydes would do surgery there, or without undertaking the preparatory due diligence that Dr. Blaydes knew was necessary. That assumption, and the changes in law Dr. Blaydes seeks, are not warranted.

ARGUMENT

I. MISREPRESENTATION, WHETHER NEGLIGENT OR FRAUDULENT, CANNOT BE BASED ON PROMISES OR PREDICTIONS AS TO THE FUTURE

Dr. Blaydes does not contest "the general rule . . . that fraud cannot be predicated on statements which are promissory in their nature, or constitute expressions of intention, and an actionable representation cannot consist of mere broken promises, unfulfilled predictions or expectations, or erroneous conjectures as to future events, even if there is no excuse for failure to keep the promise, and even though a party acted in reliance on such promise." *Janssen v. Carolina Lumber Co*., 137 W.Va. 561, 73 S.E.2d 12 (1952) (citation and quotation omitted). The rule originates at least as early as 1881. *See* Syl. Pt. 1, *Love v. Teter*, 24 W.Va. 741 (1881) (fraud "cannot be predicated on a promise not performed"). The rule was recently reaffirmed in *Gaddy Eng'g Co. v. Bowles Rice McDavid Graff & Love, LLP*, 231 W. Va. 577, 746 S.E.2d 568, 576 (2013) ("[A]ctionable fraud must ordinarily be predicated upon an intentional misrepresentation of a past or existing fact and not upon a misrepresentation as to a future occurrence.") (quoting *Croston v. Emax Oil Co*., 195 W. Va. 86, 90, 464 S.E.2d 728, 732 (1995)). There is, however, an exception, which the *Gaddy* decision also confirmed: fraud "cannot be based on statements which are promissory in nature, or which constitute expressions of intention, unless the non-existence of the intention to fulfill the promise at the time it was made is shown." *Id*.

Although Dr. Blaydes concedes that these rules govern claims for fraudulent misrepresentation,[2] Dr. Blaydes asserts that negligent misrepresentation can be based on statements that do not relate to existing facts, and can be based on promises or predictions as to

[2] Br. at 23 (the circuit court "properly stated established rules applicable to fraud").

the future. He specifically asserts that negligent misrepresentation can be based on any "statement" that is "erroneous," including a promise about the future. Br. at 18. Under the rule Dr. Blaydes advances, predictions about the future, promises as to future action, and expressions of opinion, if later shown to be erroneous, could all constitute grounds to bring negligent misrepresentation claims. Thus, statements such as "I'll meet you tomorrow" or "the Parthenon is worth seeing" could be negligent misrepresentations, if relied on to a person's detriment.

Dr. Blaydes cites no case in West Virginia, or elsewhere, with such a holding, but instead offers, as "support," a misreading of the decision in *Folio v. City of Clarksburg,* 221 W. Va. 397, 655 S.E.2d 143 (2007). In doing so, Dr. Blaydes ignores the facts of the case, in which the Supreme Court of Appeals ("Supreme Court") reversed summary judgment on both fraudulent and negligent misrepresentation claims based on promised action in the future which, the plaintiff alleged, *the defendant never intended to honor*. *Folio,* 221 W. Va. at 405, 655 S.E.2d at 149. As to both the negligent and fraudulent misrepresentation claims, the statements as to the future fell within the established exception, and the case never abrogates the general rule that a statement, to be the basis of a misrepresentation claim, must be a statement of *fact* and not a promise or statement as to the future.

Before going further into the misreading of *Folio* proposed by Dr. Blaydes, it is worth noting that the interpretation sought by Dr. Blaydes would mean the Supreme Court silently departed from an established rule. The established rule is that "[a] misrepresentation that is the basis of a claim for negligent misrepresentation must be of a fact that either exists in the present or has existed in the past, and a claim for negligent misrepresentation generally cannot be based on unfulfilled promises or statements as to future events." 37 C.J.S. Fraud § 76 (2017). The courts uniformly follow the rules and hold that future predictions, opinions, or promissory

statements cannot be the basis of negligent misrepresentation. *See, e.g.*, *Cote v. Aiello*, 148 A.3d 537, 548-49 (R.I. 2016) (negligent misrepresentation requires "a misrepresentation of material *fact*" and "an alleged misrepresentation must be factual and not promissory or related to future events") (emphasis in the original, citation and quotations omitted); *Thomas v. EMC Mortg. Corp*., 499 F. App'x 337, 342 (5th Cir. 2012) (under Texas law, a "promise to do or refrain from doing an act in the future is not actionable because it does not concern an existing fact") (citations and inner quotation omitted); *PCR Contractors, Inc. v. Danial*, 354 S.W.3d 610, 617, 619 (Ky. Ct. App. 2011) (recognizing that a statement of future intent does not qualify as negligent misrepresentation); *Birt v. Wells Fargo Home Mortg., Inc.*, 2003 WY 102, ¶ 47, 75 P.3d 640, 657–58 (Wyo. 2003) (holding that "negligent misrepresentation does not apply to misrepresentations of future intent or to statements of opinion"); *Cummings v. HPG Intern., Inc*., 244 F.3d 16, 21 (1st Cir. 2001) (holding, under Massachusetts law, that only "statements of fact are actionable" and that "statements of opinion" cannot give rise to either deceit or negligent misrepresentation) (citations omitted); *Sain v. Cedar Rapids Community School Dist.,* 626 N.W.2d 115, 127 (Iowa 2001) (recognizing that negligent misrepresentation "does not apply to personal opinions or statements of future intent") (citations omitted); *High Country Movin', Inc. v. U.S. W. Direct Co.*, 839 P.2d 469, 471 (Colo. App. 1992) (holding that "a claim of negligent misrepresentation cannot be based solely on the nonperformance of a promise to do something at a future time" because a promise is not an existing fact) (citations omitted); *McAlister v. Citibank,* 171 Ariz. 207, 215, 829 P.2d 1253, 1261 (Ariz. Ct. App. 1992) (holding that negligent misrepresentation requires "a misrepresentation or omission of a *fact*" and that a promise of future action is insufficient) (emphasis in original); *Bank of Shaw v. Posey*, 573 So. 2d 1355, 1360 (Miss. 1990) ("the first element of the tort of negligent misrepresentation must involve a

representation concerning a past or present fact" and a " a promise of future conduct" is insufficient) (emphasis and citation omitted); and *City of Warrensburg, Mo. v. RCA Corp.*, 571 F. Supp. 743, 753-54 (W.D.Mo. 1983) (holding, under Missouri law, that negligent misrepresentation cannot be based on one's intention to perform an agreement because there is no misrepresentation of an existing fact) (citations and quotations omitted).

The *Folio* decision does not reject this rule or suggest a distinction between negligent and fraudulent misrepresentation as to whether present facts or promissory statements are at issue. In *Folio*, the plaintiff alleged that the defendant, the City of Clarksburg, had misrepresented its plans to honor certain easements that were important to the plaintiff's agreement to sell property to the City. *Folio,* 221 W. Va at 403, 405 S.E.2d at 149. For the easements to be honored, the City would have to demolish a building on the property, and certain correspondence from the City to the plaintiff "suggested the City was going to demolish the commercial building" but "an internal memorandum written by a city official . . . indicated that the City never planned to demolish the building." *Id.* at 221 W. Va. at 405, 655 S.E.2d at 151. Thus, the facts of the case fit squarely within the exception that a statement that is promissory can be a false "statement of fact" if there is no intention to honor the promise, because every statement "implies necessarily the belief of the party making it that the statement is true." *Id*. (quoting *Horton v. Tyree*, 104 W. Va. 238, 242, 139 S.E. 737, 738 (1927)).

There is no holding in the *Folio* decision that negligent misrepresentation can be based on promissory statements in general, or in circumstances outside of the exceptions applicable to fraud. The only holding in the decision related to a promissory statement where the plaintiff alleged that the promisor had no intention to honor the promise. In that case, there could be liability when the speaker had no knowledge as to the promise or when the speaker knew there

was no plan to honor the promise. *Folio*, 221 W. Va. at 405, 655 S.E.2d at 151. The Supreme Court's decision contains no reference to treating promissory statements in negligence cases differently than in fraud cases.

For his erroneous claim as to a distinction regarding promissory statements, Dr. Blaydes relies on a single sentence in the case: "One under a duty to give information to another, who makes an erroneous statement when he has no knowledge on the subject . . . is as much liable in law as if he had intentionally stated a falsehood." Br. at 18 (emphasis omitted), quoting *Folio,* 104 W. Va. at 405, 655 S.E.2d at 151 (quoting Syl. Pt. 1, *James v. Piggott*, 70 W. Va. 435, 74. S.E. 667 (1910)). Although the quotation from the *James* case is in the discussion of negligent misrepresentation in the *Folio* case, the *James* case was actually about fraudulent misrepresentation. *James,* 70 W. Va. at 437, 74 S.E. at 87 (the plaintiff "charges that the fraudulent conduct of defendants prevented him from redeeming" land). There is no mention of negligent misrepresentation in the *James* decision. Thus, in relying on that fraud case within its discussion of negligent misrepresentation, the Supreme Court in the *Folio* case was actually aligning the law of negligent misrepresentation (statement made with no knowledge at all) with the law on fraudulent misrepresentation (intentional falsehood).

Ignoring all of this, Dr. Blaydes asserts that the use of the phrase "erroneous statement," and not "false statement" in *Folio's* quotation from *James* implies that there is no requirement in negligent misrepresentation that the "erroneous statement" be a statement of fact. Br. at 18 ("a false statement and an erroneous statement are not synonymous terms"). That position is not found in the *Folio* or *James* cases; it is a purely linguistic assertion by Dr. Blaydes, not justified in standard English usage and completely divorced from the actual cases using the language.

Leaving aside those problems, the position of Dr. Blaydes ignores the full context of the words quoted. The quoted language applies to one "who makes an erroneous statement *when he has no knowledge* on the subject" in which case he "is as much liable in law as if he had *intentionally stated a falsehood*." *Folio*, 104 W. Va. at 405, 655 S.E.2d at 151 (emphasis added) (inner quotation omitted). Thus, even if there were somehow any helpful implication for Dr. Blaydes, the language creates liability for an "erroneous statement" only where the speaker "has no knowledge on the subject," but that statement is in a case where the plaintiff alleged that the defendant had no intention of honoring its promise. Thus, the language Dr. Blaydes relies on in the *Folio* decision –taken from a *fraud* decision—simply confirms liability in circumstances in which the person making representations could have spoken without any basis, and not merely where the speaker knew there was no intent to honor the promise. The decision does not make distinctions between negligent misrepresentations and fraudulent misrepresentations as to future promises and present facts, and in fact, treats both types of misrepresentation similarly.

As discussed below, Dr. Blaydes does not contend that Mr. Griffith lacked knowledge or deceived him. More importantly, however, the *Folio* decision does not create the claimed distinction between negligent misrepresentation and fraudulent misrepresentation as to the types of statements (statements of fact, as opposed to promises or predictions) that can be the basis for liability. Dr. Blaydes' contrary position is a mere assertion on his part about the meaning of "erroneous statement" versus "false statement." Dr. Blaydes offers no supporting authority or even argument that the change in phraseology was intended to depart radically from the universal rule that negligent misrepresentation, like of fraudulent misrepresentation, applies as to statements of fact. Negligent misrepresentation and fraudulent misrepresentation actually differ only in the degree of culpability of the speaker in making the representation at issue. They do not

differ as to what sort of representation (factual, opinion, promissory or otherwise) must be shown by a plaintiff.

II. THE CIRCUIT COURT DID NOT INVADE THE PROVINCE OF THE JURY OR VIOLATE THE PROVISIONS OF RULE 56 IN HOLDING THAT ONLY FUTURE REPRESENTATIONS WERE AT ISSUE

Dr. Blaydes asserts there was an unresolved "question of fact," as to whether some of the statements Dr. Blaydes relied on were not statements about the future and thus were statements of fact. Br. at 9-10, 21-22. Based on this, Dr. Blaydes also asserts that the circuit court ignored the limits of Rule 56 of the West Virginia Rules of Civil Procedure, and invaded the province of the jury, because the circuit court resolved that question of fact. *Id*. A consideration of the statements relied on refutes those claims.

The brief of Dr. Blaydes first asserts that the circuit court relied on only one statement by Dr. Blaydes and "ignored" many other "descriptions of PCH's representations" that constituted statements of fact. Br. at 21. The brief then identifies a series of quotations from Dr. Blaydes' testimony that the brief simply asserts—without explanation or even identifying the specific statement(s)—constitute statements of fact. *Id*. This claim fails because the identified statements of Dr. Blaydes do not change the agreed reality: Mr. Griffith was discussing or representing a future reopening of the RSS.

The brief of Dr. Blaydes quotes the following descriptions by him (in his deposition) as to the statements made by Wayne Griffith:

> "it wasn't a potential reopening";
>
> [the RSS] "would open for us";
>
> "it's going to be opened";

> "I left the meeting [with Mr. Griffith] knowing he was going to get the surgery center open";
>
> "the staff had the direction to get the place open";
>
> "There was no uncertainty. The plan was to get it opened. That was the certainty.";
>
> "everybody told me all the time this is - -this is what we're doing. We're all committed to it.";
>
> "it's a done deal" and "That the surgery center would open. That was the representation from Mr. Griffith. No - - no - - no qualifications. Not if we have this or that, or this turns up this way, this turns that way."

Br. at 16. The brief properly refers to these as "descriptions" because Dr. Blaydes admitted that he did not "remember [Mr. Griffith's] words, all of them exactly," but he was trying to "summarize . . . as best [he] could" the discussion with Mr. Griffith. App. 53 at 33:8-15.

The brief labels the descriptions above as relating to "current fact" [Br. at 16] but does not claim that anyone confirmed that the RSS was open or had been re-opened. There is no dispute that the "plan" or "deal" or "commitment" was about reopening a facility that was closed. Indeed, the brief of Dr. Blaydes expressly concedes that both of his causes of action "are based on representations by PCH to Blaydes *regarding the reopening* of an ambulatory surgical center." Br. at 5 (emphasis added).

The character of the representations is not changed because they were stated forcefully or without conditions, such as that "it wasn't a potential reopening" or that "there was no uncertainty." One who says, "I absolutely, positively, will be there tomorrow for the meeting," is still making a promise or a prediction about the future. No degree of claimed human certitude changes the nature of reality, which is that the future is not certain. Dr. Blaydes inadvertently confirmed this in his testimony that he left the meeting (with Wayne Griffith) "knowing he was

going to get the surgery center open." The claim of "knowledge" is meaningless, as no one knows the future, and the RSS did not re-open. The PCH Board declined to do so in the midst of the global pandemic underway in 2020, and whether that was the best decision, or violated the promises made, has nothing to do with whether the representations about reopening were promises about the future.

The circuit court therefore did not invade the province of the jury, because there is no reasonable basis on which a jury could conclude that any of the quoted statements were anything but promissory or predictive in nature. Summary judgment is not an optional remedy but "must be granted when there is no *genuine* dispute of a material fact." *Payne v. Weston*, 195 W. Va. 502, 506, 466. S.E.2d 161,165 (1995) (emphasis added). For example, the Supreme Court of Appeals upheld summary judgment dismissing a fraudulent representation claim because the Court concluded that the statement at issue was "an assertion or a statement of opinion relating to a future event." *Croston*, 195 W. Va. at 90-91, 464 S.E.2d at 732-33 (1995) (upholding summary judgment as to future promises where the plaintiff did not show the promises were false when made). That holding in the fraud context is reflective of the general rule that the courts must assess the potential meaning of language and determine whether there is a "genuine dispute" as to meaning. *See*, *e.g.*, Syl. Pt. 6, *Long v. Egnor*, 176 W.Va. 628, 346 S.E.2d 778 (1986) ("A court must decide initially whether as a matter of law the challenged statements in a defamation action are capable of a defamatory meaning."); *Berkeley Cnty. Pub. Serv. Dist. v. Vitro Corp. of Am.*, 152 W. Va. 252, 267, 162 S.E.2d 189, 200 (1968) (the parties' disagreement about the "construction of a contract does not render it ambiguous . . . whether a contract is ambiguous is a question of law to be determined by the court") (citations omitted). The position of Dr. Blaydes as to the nature of the statements at issue does not mean there was a genuine issue of

material fact, or that the circuit court invaded the province of the jury in finding that there was no such issue.

III. THERE WAS NO IMPLIED PROMISE THAT THE BOARD OF PCH HAD ALREADY APPROVED THE REOPENING

The remaining arguments of Dr. Blaydes are related. To escape the general rule that promissory statements and predictions are not actionable, Dr. Blaydes argues that there was an implied representation that the PCH Board had approved the reopening of the RSS before the contact with Mr. Griffth. Br. at 12. From that claim, Dr. Blaydes argues that the representations as to reopening either constitute factual statements or violate the rule that one who makes a promise must have the intent to carry it out. Those claims fail. There is no basis on which to impute a specific implied statement that the Board had previously reviewed and approved the project, even before the late Mr. Giffith spoke to Dr. Blaydes, and before the preparatory work and assessment had been undertaken. And there is no basis on which to disregard the statements of Dr. Blaydes that all of the members of the PCH management team who spoke to him were truthful and intended to reopen the RSS. The lack of prior Board approval did not mean that the hospital as an institution did not "intend" to do what the management planned and proposed to the Board.

On that point, Dr. Blaydes testified that, in addition to the former CEO, Mr. Griffith (at that time, a strategic advisor to the Board), Dr. Blaydes worked with the "head leadership" team of the hospital: Jeff Lilley (CEO), Rose Morgan (Vice President of Patient Care Services), and Frank Sinicrope (CFO). App. 55 at 40:16-41:5. In his deposition, Dr. Blaydes was asked about whether he believed any of them had been deceptive. Dr. Blaydes testified that he did not believe

that Jeff Lilley, Rose Morgan or Frank Sinicrope ever made statements to him that they thought were untrue, and he did not know of any dishonest statement from any of them. App. 94 at 194:2-196:4. He testified that Mr. Griffith, was "always a straight shooter" and that he did not believe Mr. Griffith had been dishonest in any statements to him. *Id*. at 31:16-19,192:24-193:3. Dr. Blaydes knew the work involved in reopening would be "quite extensive" and knew it would involve licensure, certificate of need ("CON") and other matters, as well as probable "maintenance" on the building because it "hadn't been used in a year and a -- a year and a half or so, two years maybe." App. 54 at 37:16-22. Dr. Blaydes knew a "lot of prep work" would be needed. *Id.* at 37:21-22. He testified that he went to the facility in June of 2020, and saw the progress being made. App. 62 at 68:13-21. He also testified that the management team was taking "the necessary steps to reopen" the facility. App. 94 at 195:24-196:4. Most importantly, Dr. Blaydes testified that "everybody worked hard to make it happen until the rug was pulled out [by the Board]." App. 95 at 198:15-18.

Against this background, Dr. Blaydes contends that there was a misrepresentation as to the promised reopening, because there was no "intention" to reopen the RSS. But the claim as to "intention" is solely because there had not been a prior vote by the Board. Dr Blaydes cites no case holding that a corporate body can have an "intention" only if its board has expressly considered and approved the matter at issue. That is somewhat like saying that a corporation cannot have an intention to merge when management submits a proposed merger agreement to the shareholders. There is, of course, an "intention" to merge, but whether it will happen is subject to the shareholder vote. Similarly, here, there was an intention by the management to reopen the RSS and bring in Dr. Blaydes, but carrying out the intention was subject to approval of the Board.

Dr. Blaydes cites no authority actually supporting his position, and the one case his brief discusses involved corporate intention that did not involve any consideration by the corporation's board: *Elk Refining Co. v Daniel,* 199 F.2d 479 (4th Cir. 1952). There, the plaintiff obtained recission of a lease on the grounds that she had been fraudulently promised that the defendant company would lease a second piece of property from her, if she granted a lease on an initial first parcel. The court found that there was a promise to lease the second parcel, but that the company did not actually have such an intention at the time the representation was made. *Elk Refining Co.*, 199 F. 2d at 481. The field agent and "superior officers of the [defendant company] had the [second] lot under consideration…but the evidence indicates that they had no definite intention at any time of leasing it." *Id*. The case thus confirms that a promisor must have an intention to carry out the promise or be subject to a claim of fraud. The case does not support the theory that a corporate entity can only have an intention if its board has previously voted on the matter.

Dr. Blaydes also has no support for his theory that the requirement of ultimate Board approval meant that Mr. Griffith or PCH management had to obtain such approval, in advance, to avoid misrepresentation. Dr. Blaydes' contrary claim is based on the theory that a promise to do an act implies that all preconditions for carrying out the promise have been assessed and completed, and that all possible barriers have been surmounted. That would cause a dramatic change in the law of misrepresentation as it relates to promises, because it would mean that promises contain implied guarantees as to diligence in assessing the ability of the promisor to complete the promise. That would reverse the general rule that a promise cannot be the basis of a misrepresentation claim and make such claims generally actionable. Non-contractual promises or representations are not usually made after extensive assessment and preparation, but instead are based on the speaker's general intent and knowledge. Adopting the position of Dr. Blaydes as

a legal rule for promises would also be inconsistent with the rule that "fraud cannot be predicated on statements which are promissory in their nature . . . *even if there is no excuse for failure to keep the promise*." *Janssen v. Carolina Lumber Co*., 137 W. Va. 561, 570, 73 S.E.2d 12,17 (1952) (emphasis added) (quoting 37 C.J.S., Fraud, Section 11). The rule Dr. Blaydes seeks would subject the promisor to a requirement of diligence. Dr. Blaydes has no authority for imposing the implication he seeks to impose a matter of law, and doing so would radically alter the scope of liability for non-contractual promises.

In addition, Dr. Blaydes cites no facts giving rise to such an implied representation (of prior approval by the PCH Board) in the specific facts of this case. Dr. Blaydes served on a similar hospital's board for about ten (10) years. App. 52 at 28:12-29:8. He was aware that the PCH Board would have to approve reopening of the RSS. App. 52 at 27:16-20, and 67, at 87:12-15. Mr. Griffith, in the first meeting with Dr. Blaydes, did not represent that the Board had voted on the issue, and Dr. Blaydes did not ask. App. 53 at 32:19-22. In fact, Dr. Blaydes was never told by any PCH representative that the Board had voted to reopen the RSS, nor did he ask any PCH representative. App. 65 at 79:15-22.

Dr. Blaydes does not explain how he thought a hospital board could approve reopening an ambulatory care facility prior to any investigation and assessment of the project and its feasibility. Dr. Blaydes knew, as discussed above, that a "lot of prep work" would be needed. App. 54 at 37:21-22. He also knew that his input would be needed before the facility could be reopened. The initial issue, of course, is whether he would agree to move his surgical practice to a reopened RSS. Dr. Blaydes could have retired, as he was considering doing in the next few years [App. 75 at 121:15-19] or he could have provided surgery only in Beckley, where he also performed surgery for many years. App. 52 at 28:5-11. Other input needed from Dr. Blaydes

included the staffing information he voluntarily provided to Wayne Griffith [App. 56 at 42:9-14], and the information on the "number of patients we can do" to create the pro *forma* that was being given to the PCH Board. App. 64-65 at 77:15-78:3. On May 28, 2020, Rose Morgan sent Dr. Blaydes an email that said: "Assuming we are able to get the RSS surgery center opened, and things are looking in progress and well thus far, would you be interested in fulfilling the role of medical director?" App. 59 at 54:8-20.

All of the foregoing information sought and work to be done would be relevant to an informed final decision (whether by the Board or the PCH management) on "whether we are able to get the RSS surgery center opened." In light of the work needed and information to be gathered, any assumption by Dr. Blaydes that the Board made a decision without the information is at best arbitrary and would more reasonably be called irrational. The same would be true of any assumption by Dr. Blaydes that all such work and information gathering had been done even before contacting Dr. Blaydes. There are, perhaps, hypothetical cases in which the specific facts might support an implied representation that a promisor has completed all steps necessary to carry out a particular promise, including any final approval by the ultimate decision maker, but this is not such a case.

CONCLUSION

The claims of Dr. Blaydes, that there was actionable misrepresentation in the promises regarding the reopening of the surgical center, are based on errors of law and on disregard of the actual record. For these reasons, and those set forth above, the circuit court did not commit reversible error by granting summary judgment in favor of Respondent in regard to Dr. Blaydes' claims of negligent misrepresentation and fraudulent misrepresentation. As such, Respondent

Princeton Community Hospital Association, Inc. respectfully requests that the Court affirm the judgement of the Circuit Court of Mercer County.

Respectfully submitted this 3rd day of September 2024.

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CERTIFICATE OF SERVICE

I certify that on this 3rd day of September 2024, I served the foregoing ***"Brief of Respondent, Princeton Community Hospital Association, Inc."*** by electronically filing a true copy thereof with the Court's designated electronic filing service, which will send notice thereof to the following counsel of record:

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